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NO. 85-1691

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

SANFORD BERNSTEIN,

Petitioner,

vs.

COMMONWEALTH OF PENNSYLVANIA, JAMES MC CARTHY, COUNTY OF LEHIGH, WILLIAM PLATT, ANTHONY PADRONE, WULF HEUSINGER, THOMAS MURTAUGH, DONALD LAYTON, DALE YEAGER, MICHAEL ALVIN, JIMMY H. COLEMAN, NANCY B. BERNSTEIN, CATASAUQUA POLICE DEPARTMENT, ALLENTOWN POLICE DEPARTMENT, WOODROW KEISER,

Respondents.

LEHIGH COUNTY'S RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

PATRICK J. REILLY, ESQUIRE
Assistant County Solicitor
Lehigh County Courthouse
DEPARTMENT OF LAW
P.O. Box 1548
Allentown, PA 18105
(215) 820-3180
Attorney for Respondent

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LEHIGH COUNTY'S RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

I. STATEMENT OF CASE

A. FACTUAL BACKGROUND. In early 1980 Petitioner was found guilty by a jury of criminal solicitation to murder his then estranged wife, and sentenced to a term of imprisonment of from five (5) to ten (10) years and a fine of $25,000. On January 28, 1983, the Supreme Court of Pennsylvania, reviewing Petitioner's judgment of sentence, remanded the case to the Court of Common Pleas of Dauphin County for a determination of whether Petitioner was entitled to a new trial. The remand was, in part, due to an alleged recantation by a witness, Jimmy H. Coleman on March 17, 1980, of his trial testimony against the Petitioner so that the trial court could hold an evidentiary hearing as to Jimmy Coleman's credibility. At the April 4, 1983 evidentiary hearing, Coleman asserted his Fifth Amendment privilege against self-incrimination, as neither the trial court nor the Lehigh County District Attorney had granted Coleman immunity from prosecution as to his testimony at Petitioner's trial. On or about May 5, 1983, the Lehigh County District Attorney allegedly granted Coleman immunity from prosecution for purgery as to his trial testimony, and Coleman provided the statement recanting his March 17, 1980 recantation.

Petitioner alleged in his civil rights complaint that some of the Respondents conspired to frame and or set up the Petitioner for the charge of solicitation for murder, entrapped the Petitioner into a crime for which he was charged, and concocted the encouraged purgery by various Commonwealth witnesses at Petitioner's criminal trial. Bernstein further alleges that the Respondents deprived him of his Constitutional right against unlawful and unreasonable search of his residence, of his Constitutional right of not having to answer to a capital or otherwise infamous crime without a bill of particulars, and of his due process of law. Specifically, Bernstein alleged that the Respondents conspired to frame him, utilize the purgered testimony, intimidated his witnesses, and denied Coleman immunity as to the March 17, 1980 recantation which prohibited Coleman from testifying at the evidentiary hearing.

Specifically with respect to the Respondent County of Lehigh, other than the general conclusory allegations of policy and custom of failing to control and or discipline the individual Respondents within its employ (none of the named Defendants in fact being within the employ of the County of Lehigh), the only other allegation is that Lehigh County employs William Platt as its District Attorney.

B. PROCEDURAL BACKGROUND. On September 27, 1983, the District Court granted a motion for summary judgment filed on behalf of the County of Lehigh and judgment was entered in favor of the County of Lehigh and against Bernstein on the ground that the Affidavit of David K. Bausch, County Executive, had not been controverted by Bernstein.

County of Lehigh had no involvement in the proceeding before the District Court following the September 27, 1983 Order. However, an Order was entered on February 8, 1985 wherein the District Court granted the motions for summary judgment of the remaining Defendants. The County of Lehigh was nowhere mentioned in that February 8, 1985 Order and Memorandum Opinion. Bernstein then filed a motion for reconsideration of the February 8, 1985 Order, which motion was denied by Order entered May 13, 1985. Bernstein then filed an Appeal of the May 13, 1985 denial of the motion for reconsideration of the February 8, 1985 Order. Neither the motion for reconsideration nor the appeal to the United States Court of Appeals for the Third Circuit mentioned the September 27, 1983 Order granting the motion for summary judgment in favor of the County of Lehigh.

Petitioner did not at any time appeal the September 27, 1983 Order of the District Court, and had for the first time contested the motion for summary judgment granted in favor of the County of Lehigh in the within Petition for a Writ of Certiorari.

II. REASON FOR DENYING THE WRIT

A. A motion for summary judgment in favor of the County of Lehigh was granted by Order of the District Court on September 27, 1983, on the ground that the Affidavit of David K. Bausch, County Executive had not been controverted by the Petitioner. Appendix at A-4. The action thereafter continued as to six (6) other named Defendants until on February 8, 1985, the District Court entered an Order and Opinion dismissing the action against them based upon the Bar of Statute of Limitations. Appendix at A-7. A motion to reconsider was filed by Bernstein on February 19, 1985, which was denied on May 3, 1985. Appendix at A-17.

The County of Lehigh was not served with any documents in the matter from the time of judgment in its favor on September 27, 1983 until the Court entered its Order on February 8, 1985. 28 U.S.C. §2107 provides that:

> "No appeal shall bring any Judgment Order or Decree in an action, suit or proceeding of a civil nature before a Court of Appeals for review unless notice of appeal is filed, within thirty (30) days after the entry of such Judgment, Order or Decree."

In Elfman Motors Inc. vs. Chrysler Corporation, 567 F.2d 1252(3d Cir. 1977), what the Court stated in its per curiam opinion concerning lack of jurisdiction applies herein:

> "we observe that the judgment in favor of Financial and Credit, which Elfman now seeks to bring up for review on this appeal, is nowhere referred to, directly or indirectly, in the notice of appeal. That judgment was not a step in the procedural progression leading to the final judgment in the case, which was entered in favor of Chrysler. On the contrary, it involved the financial determination of Elfman's claim against two other parties, Financial and Credit, who thereupon dropped out of the case and were in no way involved in the final judgment entered on August 9, 1977 in favor of the last remaining defendant, Chrysler. Moreover, Financial and Credit were not even listed as defendants in the case in the notice of appeal, and copies of that notice, which were served by counsel for the appellant on the other defendants, were not served on them. Under these circumstances, it is impossible to construe the notice of appeal as inartificially or inferentially including the summary judgment entered on September 20, 1976 in favor of Financial and Credit.

> But this we would have to do to acquire jurisdiction to review that order. We are led inescapably to the conclusion that the appellant at the time it filed its notice of appeal did not intend to seek review of the summary judgment which it now, out of time, seeks to have us review."

In the within matter, the Third Circuit Court of Appeals had no jurisdiction to review the September 29, 1983 Order of the District Court since no appeal was taken of that Order. Likewise, as the Third Circuit Court of Appeal lacked jurisdiction, and did not, in fact, address the granting of the motion for summary judgment in favor of the County, this Court also lacks jurisdiction to address that issue.

Petitioner's memorandum in footnote sixteen (16) states that Lehigh County's motion for summary judgment was based upon a Solicitor's Affidavit on information and belief. This is an absolute fabrication. The Affidavit was prepared and signed by David K. Bausch, The Elected County Executive of Lehigh County. If Petitioner was desirous of contesting the granting of the motion for summary judgment in favor of the County, then this issue should have been raised before the Third Circuit Court of Appeals, and cannot now be raised before this Court for the first time.

III. CONCLUSIONS

For the reason set forth above, Respondent, County of Lehigh respectfully requests that the Petition of Sanford Bernstein be denied, and that this court not issue a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

PATRICK J. REILLY, ESQUIRE
Assistant County Solicitor
Attorney for Respondent
County of Lehigh

DEPARTMENT OF LAW
Lehigh County Courthouse
P.O. Box 1548
Allentown, PA 18105
(215) 820-3180

Certificate of Service

PATRICK J. REILLY, ESQUIRE, Assistant County Solicitor of the County of Lehigh, certifies that on this date he served copies of the Appellee's Brief filed herein upon all counsel of record by First Class Mail addressed as follows:

Robert J. Vedatsky, Esq.
Vedatsky & Associates
The Warwick - Suite 409
17th & Locust Streets
Philadelphia, PA 19103

William H. Platt, Esq.
District Attorney
County of Lehigh
P.O. Box 1548
Allentown, PA 18105

Jerome T. Foerster, Esq.
Deputy Attorney General
15th Floor, Strawberry Square
Building No. 1
Harrisburg, PA 17120

Kathryn Wohlsen Mayer, Esq.
435 Hamilton Street
Allentown, PA 18101

Richard J. Makoul, Esq.
461 Linden Street
Allentown, PA 18102

James A. Katz, Jr., Esq.
Leighton Cohen, Esq.
461 Linden Street
Allentown, PA 18102

Jeffrey R. Dimmich, Esq.
441 Linden Street
Allentown, PA 18101

Howard S. Epstein, Esq.
502 Turner Street
Allentown, PA 18102

Aurthur L. Pressman, Esq.
Abraham, Pressman &
Bauer, P.C.
1530 Chestnut Street
Suite 412
Philadelphia, PA 19102

John J. Obrecht, Esq.
1851 Main Street
Northampton, PA 18067

Dwight Danser, Esq.
654 Wolfe Avenue
Easton, PA 18042

Nicholas Noel, Esq.
Suite 201
531 Main Street
Bethlehem, PA 18018

Steven B. Molder, Esq.
405 First National Bank Bldg.
Easton, PA 18042

Dated: 7/2/86

Patrick J. Reilly

PATRICK J. REILLY, ESQUIRE
Assistant County Solicitor
Attorney for Respondent
County of Lehigh

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Lehigh County Courthouse
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CERTIFICATION

PATRICK J. REILLY, ESQUIRE, certifies that he is a member in good standing of the Bar of the United States Supreme Court.

Patrick J. Reilly
PATRICK J. REILLY, ESQUIRE

Dated: 7/2/86